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5 **UNITED STATES DISTRICT COURT**  
6 **DISTRICT OF NEVADA**  
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8 TONY SMITH,

9 *Petitioner,*

10 vs.

11 DWIGHT NEVEN,

12 *Respondent.*  
13

2:13-cv-01644-JCM-PAL

ORDER

14 This matter filed as a habeas petition comes before the court on petitioner's application  
15 (#2) for leave to proceed *in forma pauperis* and for initial review.

16 The court finds that petitioner is unable to pay the filing fee, and the pauper application  
17 therefore will be granted.

18 Turning to initial review, the court clearly lacks jurisdiction over the subject matter of  
19 the petition given the allegations made and relief sought.

20 Plaintiff Tony Smith was convicted, pursuant to a guilty plea, of one count of grand  
21 larceny in No. C-12-285434 in the state district court. Petitioner was sentenced to 12 to 30  
22 months with 201 days credit for time served. The judgment of conviction was filed on May  
23 1, 2013, and, *inter alia*, a direct appeal from the conviction currently is pending in the state  
24 supreme court in No. 63161.

25 In the federal petition, Smith alleges that on August 9, 2013, the state supreme court  
26 improperly denied a motion for a court order directing appellate counsel to file allegedly  
27 nonfrivolous claims that petitioner wishes to pursue. In this proceeding, petitioner prays for  
28 an order from this court directing appellate counsel to file the claims in the state court appeal.

1 A federal district court does not have appellate jurisdiction over a state supreme court,  
2 whether by direct appeal, mandamus, and/or an exercise of supervisory appellate jurisdiction.  
3 See, e.g. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Bianchi v. Rylaarsdam*, 334 F.3d  
4 895, 898 (9th Cir. 2003). In seeking to have this federal district court override an order of the  
5 state supreme court in appellate proceedings currently pending in that court, petitioner  
6 unquestionably has sought to invoke appellate jurisdiction by the federal district court over the  
7 state supreme court. The court does not have such jurisdiction.<sup>1</sup>

8 This action therefore will be dismissed without prejudice for lack of jurisdiction over the  
9 subject matter. The Court finds that providing an opportunity for leave to amend would be  
10 futile and a waste of judicial resources.

11 IT THEREFORE IS ORDERED that the application (#2) to proceed *in forma pauperis*  
12 is GRANTED, such that petitioner shall not be required to pay the \$5.00 filing fee.

13 IT FURTHER IS ORDERED that the petition shall be DISMISSED without prejudice  
14 for lack of jurisdiction over the subject matter.

15 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of  
16 reason would not find the dismissal of this action for lack of jurisdiction to be debatable or  
17 incorrect. A criminal defendant in a pending state criminal appeal is seeking to have this court  
18 override an order by the state supreme court denying the defendant's *pro se* motion to have  
19 his direct appeal counsel raise claims that he wishes him to pursue. A federal district court  
20 indisputably does not have such a supervisory appellate jurisdiction over a state supreme  
21 court. *Rooker, supra*; *Bianchi, supra*. The invocation of federal jurisdiction in this case is  
22 frivolous on its face.

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25 <sup>1</sup>The court further would note that petitioner's request for relief is likely also barred by the abstention  
26 doctrine in *Younger v. Harris*, 401 U.S. 37(1971), as he seeks a federal court order interfering in a pending  
27 state criminal proceeding that currently is on appeal. However, the lack of appellate jurisdiction by this court  
28 over the state supreme court is an issue antecedent to consideration of possible *Younger* abstention. See  
generally Comment, *Federal Injunctive Relief Against Pending State Civil Proceedings: Younger Days Are  
Here Again*, 44 La.L.Rev. 967, 986-87 (1984). The court further expresses no opinion as to whether any  
federal constitutional claims presented in this court in support of the request for relief were exhausted in the  
state court proceedings.

DATED: November 13, 2013.

JAMES C. MAHAN  
United States District Judge